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# Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 241.

HERMAN SNYDER,
PETITIONER,

*v.*

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

## BRIEF IN REPLY TO PETITION FOR CERTIORARI.

### I.

#### OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Massachusetts in the case against the petitioner is reported in Massachusetts Advance Sheets (1933), 809 (185 N.E. 376). The date of rescript of the Supreme Judicial Court of Massachusetts is April 6, 1933. The date of sentence to death by electrocution and final judgment of the Supreme Court in and for the County of Middlesex is April 18, 1933.

#### STATEMENT OF FACTS.

The petitioner was indicted, tried, convicted and sentenced to death, together with one Donnellon, in the Superior Court of the County of Middlesex and Commonwealth of Massachusetts upon an indictment charging the petitioner and two others, Donnellon and Garrick, with the capital crime of murder in the first degree. Garrick was a Government witness, and was not tried. The petitioner, with the two other defendants, on April 9, 1931, while each of them

was armed, set out to commit the crime of robbery. After stealing an automobile they drove to a gasolene station which was in charge of the deceased, one James Kiley. The petitioner Snyder entered the station with Donnellon, while Garrick remained in the car. A shot was fired from a revolver. The deceased died almost immediately after the shot was fired. The petitioner was apprehended about ten months later in Philadelphia. He was indicted April 6, 1932. Able counsel was appointed for him on April 12, 1932, thirty-four days before the trial. Counsel before and during trial had at all times access to the petitioner for the purpose of conference and the preparation of defense. All witnesses requested by the petitioner to be summoned were summoned at the expense of the Commonwealth. Under a Massachusetts statute a committee of eminent mental experts examined the petitioner and found him sane. The report of this committee was open alike to the use of the petitioner, the Government and the Court. The petitioner filed a motion for a bill of particulars, item No. 4 of which required the Commonwealth "to specify which particular defendant in fact did actually assault and beat the said James M. Kiley." To this the Commonwealth answered: "The defendant, Herman Snyder, fired the shot from said pistol that killed James M. Kiley." Item No. 5 of the petitioner's motion for a bill of particulars was: "As to the crime itself—the Commonwealth is asked to specify whether the offence alleged was—

"(a) Murder committed with deliberately premeditated malice aforethought.

"(b) Murder committed with extreme atrocity or cruelty.

"(c) Murder committed in the commission of a crime punishable with death or imprisonment for life.

"(d) Murder committed in the attempted commission of a crime punishable with death or imprisonment for life.

"(e) If it is claimed that the murder consisted of murder committed in the commission of a crime, the Commonwealth shall specify what the crime was by reference to any statute defining said crime.

"(f) If it is claimed that the murder was committed in the attempted commission of a crime, the Commonwealth shall specify which crime is referred to, what the attempts consisted of and what acts of this defendant constituted the said attempt."

The answer of the Commonwealth was: "The Commonwealth specifies that this murder was committed with deliberately premeditated malice aforethought, and also murder committed in the attempted commission of a crime punishable by imprisonment for life, to wit: robbery while armed, as defined in Chapter 265, Section 17 of the General Laws. And the Commonwealth further says that the defendant, Herman Snyder, entered said gasolene station and while armed attempted to rob the deceased, and shot and killed the deceased with a thirty-two Automatic Colt pistol."

General Laws, chapter 265, section 17, is as follows:

"Whoever, being armed with a dangerous weapon, assaults another and robs, steals and takes from his person money or other property which may be the subject of larceny, with intent if resisted to kill or maim the person robbed, or, being so armed, wounds or strikes the person robbed, shall be punished by imprisonment in the state prison for life or for any term of years."

The Massachusetts statute defining murder is as follows:

General Laws (Ter. Ed.), chapter 265, section 1:

"Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or

> cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury."

After empanelling of the jury the Commonwealth moved for a view by the jury of the scene of the crime. The petitioner requested that he be allowed to be present at the view with the jury. The Court denied this request; but intimated that, if counsel desired to take the petitioner to the scene without the jury, it could be arranged (see Appendix 1 to Petitioner's Petition, pages 35 to 38). At no time during the trial did the petitioner attempt to avail himself of this offer. The jury was sequestered.

The petitioner set up the following defenses:

1. At the time of the shooting he was insane.
2. At the time of the shooting he was under the influence of liquor.
3. When he entered the premises he intended to commit larceny, and not robbery.
4. That he did not fire the fatal shot.

It required eight full days to try the case, and approximately one-half of this time was consumed by the defense. During the trial the Government produced a detailed and comprehensive plan, drawn to scale, giving the dimensions of buildings and objects as existing upon the locus at the time of the crime. This plan was introduced and admitted in evidence after testimony by a civil engineer, who was subject to the cross-examination of the defense.

## Argument.

### 1. *Due Process of Law did Not Require the Presence of the Petitioner at the View.*

The judicial act of Mr. Justice Hammond in refusing the request of the petitioner to accompany the jury to the scene of the crime when it visited the same for the purpose of viewing it did not deprive the petitioner of the protection of the Fourteenth Amendment to the Constitution. His presence was not necessary to any fundamental conception of due process of law.

*Bank of Columbia* v. *Okely,* 4 Wheat. 235, 244.
*West* v. *Louisiana,* 194 U.S. 258, 262.
*Allen* v. *Georgia,* 166 U.S. 138, 140.
*Frank* v. *Mangum,* 237 U.S. 309, 326.

The Massachusetts position that there is no violation of a constitutional right of an accused when a view is taken in his absence or in the refusal of a trial judge to permit him to attend a view with a jury is supported by respectable authority and is maintained by many state courts.

*Com.* v. *Dascalakis,* 246 Mass. 12, 32.
*Com.* v. *Belenski,* 276 Mass. 35, 40.
*State* v. *Rogers,* 145 Minn. 303, 309.
*State* v. *Adams,* 20 Kan. 311, 325.
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*Shular* v. *State,* 105 Ind. 289.
*Valdez* v. *United States,* 244 U.S. 432.

As to what is meant by the words "law of the land" and their equivalent, "due process of the law," the Supreme Court has said "that they were intended to secure the individual from the arbitrary exercise of the powers of govern-

ment, unrestrained by the established principles of private rights and distributive justice:"

*Bank of Columbia* v. *Okely,* 4 Wheat. 235, 244.

The Massachusetts practice as disclosed by highly important capital trials has treated the subject of regulating the taking of views as a discretionary function of the Court.

*Com.* v. *Dascalakis,* 246 Mass. 12, 30, 31.
*Com.* v. *Webster,* 5 Cush. 295.
*Com.* v. *Phelps,* 210 Mass. 78, 82.

There is, therefore, no ground, either upon legal principle or upon practical fairness, for holding the presence of the accused himself to be essential. It is a discretionary function of the Court. Ordinarily a Court might grant a defendant's request to be present on a view, but conceivably he might refuse to grant the request for prudence' sake, perhaps because of the danger of escape or of mob violence.

The principle that a view is not a part of a trial and in only a limited sense the taking of evidence is recognized by many courts and text-writers and has been enacted into statute in many states.

It is supported by excellent reasoning.

The chief purpose of a view is to enable the jury to understand better the testimony which has been or may be introduced. Under the practice of taking a view the essential features may be pointed out by the counsel. The oath to the court officers having charge of a jury on a view is to the effect that no one shall be suffered to address the jury. There can be no comment or discussion. The jury can obtain information only through sight. One or two aids, representing both the Commonwealth and the defendant, go on the view; it being permissible for them, in the presence of each other, to point out to the jury marks, matters and things, but not otherwise to speak to the jury. A view often

dispenses with the necessity of a detailed description by plan or word of mouth.

Inevitably that which the jury sees on a view will be utilized in reaching a verdict. In that sense that which is disclosed on a view is evidence. In another more strict and narrow sense a view may be thought not to be evidence. Plainly it is not testimony. It is not given by witnesses. The right of cross-examination is not infringed. The premises themselves are not witnesses. How could the place viewed be cross-examined? What human credit does it have that makes cross-examination necessary? The defendant, if present, could not lawfully ask questions or make statements, and the sole value of his presence would lie in the opportunity to see that nothing irregular was done and to obtain such a knowledge of what was done to assist him in the subsequent conduct of the trial. This opportunity he already fully possesses, for he is represented at the view by his attorney, and this attorney is in a position, not only to observe what is done, but to make all his observations useful later to his client as may be needed.

3 Wigmore, Evidence (2d ed.), 1803.

It may be true, as contended by the petitioner, that this is the first time that the precise point raised by him has been presented to this Court, and that other cases may seem to have turned upon the question of an actual or implied waiver by an accused of the right to be present when the jury took a view.

The respondent contends, however, that the matter complained of is not of sufficient importance to warrant the allowance by this Court of the extraordinary process prayed for. The hopeless conflict of authorities as to the exact nature of a jury view demonstrates that the majority of courts consider the matter one of practice, and not of substance. The question presented involves only a question of

procedure, and no question of substance nor general principle of law.

The petitioner was tried in a commonwealth which assiduously surrounds one accused of capital crime with every safeguard to his legal rights.

The Supreme Court of Massachusetts has stated that there was no violation of the petitioner's rights under the Massachusetts Declaration of Rights.

> *Com.* v. *Snyder*, Mass. Adv. Sheets (1933), 809, 817.

The Federal Supreme Court recently stated that "with any error of the state court involving alleged contravention of the state statutes or constitution we, of course, have nothing to do."

> *Powell* v. *Alabama*, 287 U.S. 45, 52.
> *Rogers* v. *Peck*, 199 U.S. 425, 434.
> *Hebert* v. *Louisiana*, 272 U.S. 312.

The petitioner has cited the Sixth Amendment to the Constitution of the United States.

This amendment, in substance the same as article XII of the Massachusetts Declaration of Rights, is not applicable.

> *West* v. *Louisiana*, 194 U.S. 258, 261.

The Federal Supreme Court has again and again declared that when the highest court of a state has acted within its jurisdiction and in accordance with its construction of a state constitution and laws, very exceptional circumstances will be necessary in order that the Federal Supreme Court will feel justified in saying that there has been a failure of due process of law.

> *Allen* v. *Georgia*, 166 U.S. 138.
> *Frank* v. *Mangum*, 237 U.S. 309.
> *Twining* v. *New Jersey*, 211 U.S. 78.

*Hurtado* v. *California*, 110 U.S. 516.
*Felts* v. *Murphy*, 201 U.S. 123, 129.

*2. Denial of Effective Assistance of Counsel.*

The petitioner was not denied the effective assistance of counsel. This fact is apparent upon the face of the record.

In light of the Massachusetts theory that a view is not part of the trial, a subsequent visit of the petitioner and his counsel to the scene of the crime, as was suggested by the Court, would have been as effective an aid to the petitioner as his visit to the scene with the jury.

The view in this case could but assist the jury in visualizing the plan introduced in evidence which they took to the jury room.

If the petitioner was sincere in his contention that a visit to the scene would assist him in his defense, he would have accepted the suggestion of the Court of visiting the scene with his counsel under circumstances attracting less public attention than a visit with the jury (see Appendix 1 to Petitioner's Petition, pages 35 to 38).

The petitioner in his brief has made frequent references to the case of *Powell* v. *Alabama*. There can be no comparison between the opportunity afforded the defendants in that case and the opportunity afforded the defendants in this case to have effective aid of counsel.

The casual appointment of counsel at the eleventh hour in the Powell case is a marked contrast to the appointment in this case, which was made less than a week after indictment and almost five weeks before trial. The petitioner at all stages was ably represented by counsel learned in the law, who took to the Supreme Court of Massachusetts almost ninety exceptions.

Massachusetts in 1780, in one of the earliest state constitutions, recognized the right of accused to have counsel.

> Massachusetts Constitution, Declaration of Rights, article XII.

In Massachusetts "No person shall be assigned as counsel in a murder case unless he has been a member of the bar for more than ten years."

Superior Court Rules (1932), Rule 95.

*3. Denial of Equal Protection of the Laws.*

The contention of the petitioner that a defendant who is on bail or admitted to bail would be free to accompany the jury at the view, while the petitioner in the instant case, because it was a capital case, was refused such request, and as a consequence was refused equal protection of the laws, is unfounded. There is no decision holding that a defendant in a case less serious than a capital case is entitled by reason of the lesser gravity of the charge to accompany the jury on a view. There is no practice that upon a charge less serious than a capital charge the accused is free to accompany the jury on the view.

The Massachusetts practice in all cases pertaining to views has been that the matter is entirely discretionary with the Court.

The language of the statute is: "The court may order a view by a jury impanelled to try a criminal case." General Laws (Ter. Ed.), chapter 234, section 35. The matter of granting a view is by statute discretionary, and if a trial Court deems one an aid to the administration of justice, the further exercise of the same discretion permits it to prescribe the manner of its taking and who shall be present thereat.

*Com.* v. *Chance,* 174 Mass. 245.
*Com.* v. *Dascalakis;* 246 Mass. 12.
*Rigg* v. *Boston, R.B. & L. R.R. Co.,* 158 Mass. 309, 311, 313.
*Com.* v. *Webster,* 5 Cush. 295.
*Com.* v. *Knapp,* 9 Pick. 495, 515.
*Tully* v. *Fitchburg R.R. Co.,* 134 Mass. 499, 503.

On the other hand, the facts in this case demonstrate that the petitioner was afforded the fullest protection of the laws by having able assistance of counsel; that as to his sanity he was provided with the services of eminent specialists under what is generally considered one of the most enlightened legislative enactments of recent years. The material portions of this statute are as follows:

> General Laws (Ter. Ed.), chapter 123, section 100A:
>
> "Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. . . . The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the probation officer thereof, the district attorney and to the attorney for the accused."

## Conclusion.

It is therefore respectfully submitted that this case is not one calling for the exercise by this Court of its supervisory powers, and that there is nothing in the record to support a contention that any right of the petitioner under the Federal Constitution has been violated in the minutest particular. His trial was full and fair according to the laws and practice of the Commonwealth of Massachusetts, and throughout

it he was accorded due process of law in every particular. He was not deprived of the effective assistance of counsel and he had the equal protection of the laws as existing in a commonwealth priding itself upon its humane attitude toward all accused of capital crimes. Consequently the petition should be dismissed.

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